BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BENNIE L. KENT	)	
Claimant	)	
VS.	)	
	)	Docket No. 250,939
SUMMIT DRILLING	)	
Respondent	)	
AND	)	
	)	
LEGION INSURANCE	)	
Insurance Carrier	)	

ORDER

Claimant appealed the April 4, 2000 preliminary hearing Order entered by Administrative Law Judge Robert H. Foerschler.

ISSUES

This is a claim for a November 15, 1999 accident and the resulting injury to the left hand. After conducting a preliminary hearing and reviewing the testimonies of four witnesses who were deposed, Judge Foerschler denied claimant's request for benefits, finding that drugs had contributed to the accident.

Claimant contends Judge Foerschler erred. Claimant argues that respondent did not have probable cause to request a drug screen and, therefore, the lab results and testimony regarding those results are not admissible. Additionally, claimant contends that the alleged impairment did not contribute to the injury as the accident was caused by others and occurred so quickly that he would have sustained injury regardless of any impairment.

Conversely, respondent and its insurance carrier contend the results of the urine drug screen are admissible as the test complied with the requirements of the Workers Compensation Act. Additionally, they argue that the evidence establishes that claimant was impaired by marijuana at the time of the accident and such impairment contributed to the accidental injury. Therefore, they argue that the Judge's Order should be affirmed.

The issues on this appeal are:

1. Are the results from the drug screen and the testimony about those results admissible?

2. Did drug use contribute to claimant's injury?

FINDINGS OF FACT

After reviewing the record compiled to date, the Appeals Board finds:

1. Claimant was employed by respondent as a derrick man on a crew drilling natural gas wells. On November 15, 1999, claimant injured his left hand when a casing pipe fell, striking his hand. According to claimant, he injured his hand because he reacted by raising his hand in the air for protection. Claimant's immediate supervisor, Harold Beck, Jr., witnessed the accident and described it as follows:

> The pipe was slid over to the side so they could get the other joint. They were screwing one together when the pipe started to slide and the pipe come down. It did not hit the V door and bounce over. It fell straight down. And Bennie [claimant] had his hand getting the other joint ready and the joint came down and hit him on the hand.[1]

According to Mr. Beck, the accident occurred in half a second.

2. Immediately following the accident, Mr. Beck looked at claimant's hand. Knowing that a urine test was required and before leaving for the hospital, claimant told Mr. Beck that Mr. Beck would have to provide the urine sample. Mr. Beck testified:

> Q. (Mr. Burnett) Right after the accident and before you headed to the hospital did Mr. Kent make any statements to you?
>
> A. (Mr. Beck) Well, he just, I said, "We've got to go" and he just looked at me square in the eye and I could see no humor and he said, "You're going to have to piss in the bottle for me." And I said, "I cannot do that."[2]

3. Claimant was then taken to a hospital emergency room. On the way to the hospital, claimant told Mr. Beck that he thought he could pass the urine test. At the hospital, claimant gave a urine sample for drug screening.

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[1] Preliminary Hearing, March 16, 2000; p. 57.

[2] Preliminary Hearing, March 16, 2000; p. 59.

4. Respondent's company policy is that anyone who is injured on the job must undergo a drug test. Claimant's drug screen was requested because of that company policy and not because the company had a reasonable suspicion to believe that claimant was impaired at the time of the accident. That finding is based upon Mr. Beck's testimony that claimant did not exhibit any signs of being impaired either immediately before or immediately after the accident. Mr. Beck testified:

> Q. (Mr. Cooper) . . . Now, when Mr. Kent arrived at work at 7 o'clock that morning you didn't notice anything different about him at that time?
>
> A. (Mr. Beck) No, I did not.
>
> Q. He seemed normal to you?
>
> A. Seemed like a normal Bennie coming to work.
>
> Q. And he wasn't staggering around?
>
> A. No.
>
> Q. Didn't have any problem climbing that ladder up to the catwalk?
>
> A. No.
>
> Q. Didn't notice anything about him that caused you any concern at all?
>
> A. No.
>
> Q. In fact, you had never at any time noticed any conduct by Bennie Kent that you felt in any way demonstrated to you that he was impaired, did you, sir?
>
> A. No, I did not that particular day.
>
> Q. And you rode with him all the way to the emergency room, didn't you?
>
> A. Yes, I did.
>
> Q. And you didn't feel like at that time he was in any way impaired by drugs or alcohol, did you?
>
> A. No.

> Q. The only thing that caused you any concern was he told you he might have some concern about passing a drug test?
>
> A. That is correct.[3]

Additionally, the medical technician that took the urine sample, Mr. Vincent Thorpe, testified that he did not observe any actions on claimant's part that indicated claimant was under the influence of drugs.

5. Respondent and its insurance carrier deposed Dr. Timothy M. Scanlan, who testified that he believed that marijuana contributed to claimant's accident. In reaching that conclusion, Dr. Scanlan considered the results from the disputed drug screen. Additionally, the doctor testified that he could not say whether claimant could have avoided the accident even if he had not been impaired.

6. The parties also deposed Dr. Stuart M. Kagan, a medical review officer for Pipeline Testing Consortium, of which respondent is a member. Dr. Kagan testified that the literature indicates that there is no correlation between the level of THC, the psychoactive form of marijuana, and impairment. When asked if the THC level indicated in the contested drug screen contributed to claimant's accident, the doctor could not answer that question.

CONCLUSIONS OF LAW

1. Because the results from the drug screen are inadmissible, the preliminary hearing findings that claimant was impaired and that the impairment contributed to the injury should be reversed.

2. The evidence fails to establish that there was probable cause to believe that claimant had used, had possession of, or was impaired by drugs or alcohol while working. Therefore, the drug screen results are not admissible and should not be considered in this proceeding. Because Dr. Scanlan's opinion that claimant was impaired by drugs at the time of the accident was premised upon the drug screen results, that opinion is likewise inadmissible.

3. The Workers Compensation Act severely restricts the admission of drug screen test results. The Act provides that six factors must be proven before drug test results can be admitted into evidence:[4]

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[3] Preliminary Hearing, March 16, 2000; pp. 63, 64.

[4] K.S.A. 1999 Supp. 44-501(d)(2).

> (A) There was probable cause to believe that the employee used, had possession of, or was impaired by the drug or alcohol while working;
>
> (B) the test sample was collected at a time contemporaneous with the events establishing probable cause;
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> (C) the collecting and labeling of the test sample was performed by a licensed health care professional;
>
> (D) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;
>
> (E) the test was confirmed by gas chromatography, gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample; and
>
> (F) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee.

4. The Workers Compensation Act does not define probable cause. The Appeals Board holds the phrase means having sufficient information to lead a reasonable person to conclude that there is a substantial likelihood that drugs or alcohol were either used by or impaired the injured worker.[5] There was nothing about how the accident occurred or how claimant acted before or after the accident that would lead a reasonable person to believe that claimant was impaired at the time of the accident.

5. Because the results of the drug screen are not admissible and, therefore, not part of the evidentiary record, the record lacks other evidence to reasonably conclude that claimant's injury was contributed to by his use of drugs or alcohol. Conversely, the evidence supports the conclusion that there was insufficient time to react to the falling pipe and, therefore, the accidental injury would have occurred regardless of any level of impairment.

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[5] See Lindenman v. Umscheid, 255 Kan. 610, 875 P.2d 964 (1994) and *In re* Estate of Campbell, 19 Kan. App. 2d 795, 876 P.2d 212 (1994), both of which define probable cause in the context of a civil proceeding. In Lindenman, the Kansas Supreme Court defined probable cause in a malicious prosecution case as "reasonable grounds for suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious or prudent person in the belief that the party committed the act of which he or she is complaining." In Campbell, the Court of Appeals defined probable cause in a will contest as "the existence of evidence . . .which would lead a reasonable person, properly informed and advised, to conclude . . . "

6. As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.[6]

WHEREFORE, the Appeals Board reverses the April 4, 2000 preliminary hearing Order and remands the proceeding to the Judge to address claimant's request for preliminary hearing benefits.

IT IS SO ORDERED.

Dated this ____ day of June 2000.

BOARD MEMBER

c: Jeff K. Cooper, Topeka, KS
David L. Vogel, Wichita, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director

[6] K.S.A. 1999 Supp. 44-534a(a)(2).